

1635. February 11. MUIRE *against* MUIRE.

No. 21.

The Lord refused to sustain action at an apparent heir's instance reducing a disposition granted by his predecessor, unless the pursuer would enter heir, altho' thereby a passive title would be incurred.

In a reduction of a bond of alienation of a tenement in Glasgow, made by umquhile David Muire, in favours of Janet Muire his father's sister, at the instances of the apparent heirs of the said umquhile David, the Lords found, that this action of reduction, moved at the instance of the apparent heir, could not be sustained to reduce an heritable disposition of lands, made by the defunct, to whom the pursuers were neither heirs, nor had any other real right to the lands; and this action was not sustained at the pursuer's instance, as apparent heir to the defunct, maker of the disposition, upon that interest, as if they as apparent heirs, might crave reduction to that effect, that they by the discussing of this action, might know whether they might enter heirs or not to the defunct; for they ought to consider of their hazard themselves, and ought not to be suffered to pursue upon that interest, for that end.

Act. *Nicolson & Maxwell.*

Alt. *Stewart & Gilmore.*

Clerk, *Gibson.*

Durie, p. 754.

No. 22.

A creditor has sufficient title to call for exhibition of writs, although he have not adjudged or been infeft.

1635. July 3. JOHN HOWISON *against* JOHN STARK and SIR DAVID MURRAY.

John Howison being addebted to Patrick Gibson in 2000 merks, was obliged to infeft Patrick in an annualrent of 200 merks to be uplifted out of some tenements of his in Edinburgh. Thereafter these tenements were comprised from the said John, and the right thereof by progress established in the person of John Stark, who gave a back-bond to John Howison, that whenever he should pay to the said John Stark 8000 merks, that he should dispone back to him his own tenements. The said Patrick Gibson, as a creditor of John Howison's, craved exhibition of the said bond against the said John Stark, and Sir David Murray, havers thereof, to the effect he might have transumpt thereof. Alledged, he had no right to call for exhibition thereof, except either he had comprised it, or gotten it adjudged. Replied, That ought to be repelled in respect of the pursuer's bond produced shewing him to be a creditor of the said John Howison, which furnisheth him sufficiently interest to call for exhibition of any evident conceived in his debtor's favours, to the effect that after the same is exhibited, he may comprise the right thereof; the Lords repelled the allegiance against the exhibition.

Spottiswood, (EXHIBITION) p. 125.

No. 23.

A general service is a sufficient

1635. December 12. ROWAN *against* WARDLAW.

Mr. David Wardlaw, having comprised from Rowan some lands, wherein Rowan was infeft, for debt owing to him by the said Rowan, and upon the said

comprising, he being infest; after the decease of the said Rowan his debtor, another Rowan brother to the defunct, as general heir to their father, who was infest in the same lands, pursues for reduction of Mr. David Wardlaw's comprising and infestment: And the defender alleging, that the pursuer by virtue of this title of general retour, as heir to his father, could not have interest to pursue for reduction of his real right of comprising and infestment, except he had been specially served and infest *per expressum* in these lands; the Lords repelled this allegiance, and found this general retour of the pursuer, as general heir, was sufficient to give the pursuer a title and interest to reduce the said real right, and sustained the same.

Act. Bruce.

Alt. Macgil.

Clerk, Gibson.

Durie, p. 785.

No. 23.
title to sue
reduction of
real rights.

1637. March 16.

EDMONSTON against EDMONSTONS.

The Laird of Edmonston having a feu of the lands of given to himself, and to the heirs-male gotten of his body, which failzying, to his eldest heir female without division; the first feu's son dying without heirs-male gotten of his body, and leaving behind him three sisters, and having before his decease disponed the heritable right of the lands to his two youngest sisters, the eldest sister as apparent heir of provision, by the condition of the said feu, pursues reduction of the said right, made to the other sisters, as done *in lecto ægritudinis*, and to her prejudice; wherein the defenders alledging, that this action of reduction cannot be sustained at the instance of an apparent heir, except she were served and retoured heir of provision to these lands, according to the condition of the infestment, without which were done, she can never be heard to reduce as apparent heir, especially seeing she cannot be general heir, being but one of three sisters; as also, this right is competent only to the heir of provision, and not to an apparent heir of provision, the condition of the security being so conceived; and the pursuer answering, that the process ought to be sustained at her instance as apparent heir, in respect of the great hazard she runs if she should enter heir; for then *eo casu* she behoved to be liable to all the defunct's debts, how great soever they were, and she has but an uncertain action wherein she may succumb; and it were against all conscience and reason, that if she win not this cause, yet she should be liable to the defunct's whole debts, seeing she is content, if she prevail here, to serve herself heir; the Lords found the allegiance relevant, in respect of the tenor of the infestment, the benefit whereof could not be acclaimed by any, but by an heir retoured; and found that the apparent heir, specially an apparent heir of provision, could not be heard to pursue this reduction, before she were retoured heir of provision.

Act. Johnston.

Clerk, Hay.

Durie, p. 838.

No. 24.
Found in
conformity
with Muire
against Muire,
No. 21. *supra*.